No. 14356

In the United States Court of Appeals

For the Ninth Circuit

VERN GEORGE DAVIDSON,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Appellant's Opening Brief

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Appellant's Opening Brief

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction of the appellant by the District Court of the Southern District of California.

This court has jurisdiction under the provisions of 28 United States Code, Sections 1291 and 1294 (1).

STATEMENT OF THE CASE

Appellant was indicted on July 8, 1953 under U.S.C. Title 50, App. Sec. 462—Selective Service Act, as amended 1951, for refusing to submit to induction [R. 3][1]

[1]All references to the Transcript of Record are designated by pages of it, as follows [R. 3]. The entire Selective Service File of appellant was entered in evidence as Government's Exhibit 1. All references to the file are designated by pages of Exhibit 1, as follows: [Ex. p. 3]; the pagination of Exhibit 1 is by a one-quarter inch high pencilled number, circled, and ordinarily is found at the bottom of each sheet of Exhibit 1.

Appellant was convicted by Judge Harry C. Westover, jury trial having been waived, on November 30, 1953 [R. 6-14]; he was sentenced by said judge to a 3-year term of imprisonment on December 7, 1953 [R. 15-16].

In the court below as well as before the Selective Service agencies, and the Department of Justice appellant claimed to be a conscientious objector to all participation in military activities and that he was entitled to a classification as such. His initial claim was made in his Classification Questionnaire [Ex. pp. 4-18]; this was on October 20, 1948. The Classification Questionnaire is the first opportunity a registrant has to make such an avowal.

To his Questionnaire he added explanations of his answers.

> "It will be noted that I have not completed the Second statement in this series. I would like to make it clear that I feel that no humanitarian or democrat should ask or should answer such a question. Such a question has its basis in the prejudice and discrimination that now dominated the armed forces of this country. Therefore I consider my race as my own business and shall refuse to answer this question under any circumstances." [Ex. p. 10.]

Series XIV of the Questionnaire is to be signed by all registrants who profess to be conscientious objectors. It is in essence a request to be sent the selective service document entitled Special Form for Conscientious Objector. Appellant signed Series XIV [Ex. p. 15] and wrote, after his signature, "See note attached."

On pages 11, 12 and 13 of the Exhibit we find this note; it contains a copy of a letter he had sent to his college paper, preceded by the following:

> "It will be noted that I have signed series XIV. I would like to make my position clear. I do conscientiously object to war and to conscription for any reason. But, my beliefs are not religious, they are basicly [*sic*] political. As a political objector I shall resist this totalitarian move by my own country as I would resist it in any other country. My position is briefly stated in the attached newspaper article by myself. If after considering these facts the board feels that they wish to send me the form for conscientious objectors, I will be glad to fill it out and return it to the board with the understanding that my objections are not religious but political."

He was then 19 years and 2 months old.

The Minutes of Actions [Ex. p. 10] reveal the following facts: The local board sent him the form; he executed and filed it on February 27, 1950; he was classified in Class I-A on July 12, 1950; his appeal was honored and the appeal board, after a preliminary finding [required by the then existing regulation] asked the United States Attorney to procure an advisory recommendation from the Department of Justice. The request is on page 32 of the Exhibit. This is the standard procedure where the registrant's request for a conscientious objector classification is not granted by the local board or by the appeal board on its first, (preliminary) consideration. The then governing regulation, § 1626.25 plus the Attorney General's practice, provided for: (1) an extensive FBI investi-

gation (secret), (2) a Hearing Officer's report to the Attorney General (a copy according to the then existing practice, being placed in the registrant's selective service file; see pages 36-41), and (3) an Attorney General's recommendation to the Appeal Board (copy being placed in the file; see page 35).

The Hearing Officer informed the Attorney General that he believed appellant seems to be sincere [Ex. p. 40] but concluded that appellant was not religious in his beliefs or that his beliefs were based on his early religious training. He noted that appellant's ideas were "of rather recent origin. During his first two years in the university he took military training. All reports are that he is of "good personal character." [Ex. p. 39].

Appellant was then 21 years of age.

The Hearing Officer, the Attorney General and the Appeal Board agreed that he should not receive a conscientious objector classification, the Appeal Board Classification of I-A being on February 13, 1951.

Appellant was ordered to report for induction but, by reason of his scholastic work, the order was postponed. [Ex. pp. 43—].

Thereafter, once again (on November 6, 1951, see page 58), after his appeal was honored, the Appeal Board requested the United States Attorney to secure an advisory opinion from the Attorney General. During the subsequent investigating period appellant submitted evidence to support a claim advanced for an occupational deferment; appellant had left school and taken employment as the National Secretary and Or-

ganizer for the Young Peoples' Socialist League [see page 59, 61, 62].

Appellant testified in court that the following occurred during this investigatory period and before the Attorney General sent his letter of recommendation to the Appeal Board on July 29, 1952: [R. 51-52, 75-87; stipulation: 83-86].

> He was instructed by Nathan Freedman, Hearing Officer of the Department of Justice to appear before him in Los Angeles on May 19, 1952 for the hearing officer hearing but, because appellant was employed in New York at the time appellant asked to have the hearing transferred to a New York Hearing Officer; the hearing was transferred and a New York Hearing Officer named Gallagher notified him to come to his office for the hearing. Appellant appeared before the Hearing Officer. He was informed by Mr. Gallagher that the hearing had been cancelled. This was almost two years after the "Los Angeles" hearing before Mr. Ray Files. Appellant testified that his occupation had meanwhile changed and that his views with respect to religious objection to war had matured. [R. 52]. No hearing was ever held to hear about this.
>
> Appellant was then one month short of being 23 years of age.

After the cancellation of the July 23, 1952 hearing by the New York hearing officer, the Attorney General sent the file to the Appeal Board with his recommendation that the appellant not be classified as a conscientious objector [Ex. pp. 64-65].

Thereafter appellant was ordered to report for induction on October 17, 1952. [Ex. p. 69].

Upon his verbal refusal to submit [Ex. p. 72] and his written statement to the same effect [Ex. p. 73] appellant was indicted, as aforesaid.

QUESTIONS PRESENTED AND HOW RAISED

I

The record shows that upon the second appeal of the case to the appeal board there was no hearing conducted by the Department of Justice (although defendant appeared at the place and at the time set forth in the order to appear) as required by the Act and Regulations in cases of appeals by registrants professing conscientious objections to all military training and service both combatant and non-combatant.

The question presented is whether, on a second administrative appeal (over 18 months having elapsed) a second hearing officer hearing is required to determine the current *bona fides* of the registrant's professions of conscientious objection to war.

This point and the following ones were raised by oral motions for judgment of acquittal. [R. 21, 29 and 71.]

II

The record shows that before trial appellant caused to be subpoenaed the secret FBI investigative report. The Government moved to quash the subpoena. This motion was granted. [R. 23-24.] The motion of the appellant to examine the FBI report was denied. [R. 23-24.]

In the motion for judgment of acquittal complaint was made that the failure to compel the production of the FBI report had deprived appellant of due process of law.

The question presented here, therefore, is whether the trial court committed reversible error in failing and refusing to permit the secret FBI investigative report to be examined and used by the appellant upon the trial for the purpose of showing that the Los Angeles hearing officer and the Attorney General (after the first and/or second appeal) had failed to give a full, fair and adequate summary of the adverse information appearing in the report as required by due process of law, the Act and Regulations.

III

The record shows that the undisputed evidence was that the recommendations by the Department of Justice to the appeal board were both made without copies or notice to appellant. The appellant also testified that he did not know about the unfavorable recommendation until after the appeal board determination. [R. 51.]

In the motion for judgment of acquittal it was contended that the action taken by the appeal board in accepting the recommendation of the Department of Justice and denying the conscientious objector status without giving appellant the right to answer the unfavorable recommendation was a deprivation of procedural due process of law. [R. 30, 71-72.]

The question here presented, therefore, is whether the use of the unfavorable recommendation by the

Department of Justice to the appeal board and the denial of the conscientious objector status without giving appellant an opportunity to answer the unfavorable recommendation were a deprivation of appellant's rights to a full and fair hearing contrary to due process of law guaranteed by the fair and just provisions of the Act and the Fifth Amendment to the United States Constitution.

IV

The undisputed evidence is that the local board failed to have available an Advisor to Registrants and to have posted conspicuously or any place, the names and addresses of such advisor, as required by the Regulations, Section 1604.41.

The question presented is whether this violation of law alone, or in connection with other circumstances in evidence constituted a denial of due process.

V

The record shows that despite the fact all the selective service agencies *at all times* (and the Department of Justice itself, on the occasion of the first appeal), believed appellant was entitled to exhaust his full administrative remedies, the Department, at the last minute, prevented appellant from having the "Brooklyn" hearing officer hearing. The undisputed reason given was "Because you already had a hearing". [R. 52.]

The question presented is whether the lapse of time, almost two years, after the first (Los Angeles) hear-

ing, plus the fact all other administrative appellate steps were given Davidson required a "Brooklyn" hearing; put another way: did the Department of Justice misconstrue the law?

VI

The record shows that appellant from the first asserted: "I do conscientiously object to war and to conscription for any reason", [Ex.p.11] but repeatedly stated he wasn't religious but was a political objector and that he didn't believe in a "Supreme Being". [Ex. p. 20.]

The law requires that a registrant establish that he believes in a Supreme Being and that the basis of his objections are religious.

The question presented is whether the law discriminates againt religions that do not believe in a Supreme Being and against registrants whose religion is not one that is expressed in orthodox terms.

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motion for judgment of acquittal, duly made at the close of all the evidence.

II.

The district court erred in convicting appellant and in entering a judgment of guilty against him.

III.

The district court erred in refusing to permit the appellant to explain the answers he gave to the court's questions. [R. 70-71.]

SUMMARY OF ARGUMENT

I.

The undisputed evidence shows that appellant was not given a hearing officer hearing, in Brooklyn, on July 23, 1952; the only reason disclosed is the explanation given appellant, when he asked the hearing officer "Why?" "Because you already had a hearing." [R. 52.]

The law and the regulations make the hearing mandatory.

> *United States v. Nugent,* 73 S. Ct. 991;
> Sec. 6(j) U.S.C. 50 App.

Appellant received all other of the administrative appellate steps on his second appeal except the hearing. Heretofore, the Department of Justice always agreed with General Hershey that *each* time he appealed a registrant was entitled to the so-called "special" appellate procedure for conscientious objectors.

> "The Department of Justice and Selective Service took the position that *each* time the case of a registrant who claimed to be a conscientious objector came before the board of appeal, the case must be referred to the Department of Justice for its recommendation. This was felt to be the direct

application of the law. In addition *such reference was necessary because new factors* in the case might be brought to light by the Department's investigation and hearing." (Emphasis added.)

> See Selective Service System, *Conscientious Objection,* Special Monograph No. 11, Vol. 1, page 150, Washington, Government Printing Office, 1950. Also see pages 147 and 155.

The Attorney General misconstrued the law when he denied appellant the second hearing. The fact that appellant already had had a hearing did not excuse the denial of the *re-examining* hearing since (1) so much time had elapsed after the first hearing, and (2) the intent of the law is that *all* the facts are to be reexamined by a Hearing Officer.

II.

Appellant was denied his rights to prodecural due process of law when the appeal board considered and acted upon the adverse recommendations made by the Department of Justice against appellant without first giving him an opportunity to answer the recommendations.

The recommendations by the Department of Justice were adverse to appellant. The appeal board was told by the Department of Justice that appellant was not a conscientious objector. The recommendation was considered by and relied upon by the appeal board without giving appellant an opportunity to answer it before the appeal board made the final classification.

The denial of the right to answer an unfavorable recommendation is a deprivation of procedural due process of law.—*Kwock Jan Fat v. White,* 253 U. S. 454, 459, 463, 464; *Morgan v. United States,* 304 U. S. 1, 22, 23; *Degraw v. Toon,* 2d Cir., 151 F. 2d 778.

The trial court should have sustained the motion for judgment of acquittal.

III.

The court below committed reversible error when it refused to receive into evidence the FBI reports and excluded them from inspection and use by the court and the appellant upon the trial of this case.

Upon the trial appellant subpoenaed the secret investigative report of the FBI. A motion to quash was made by the Government. This was granted.

The trial court committed grievous error when it refused to permit the exhibit to be used as evidence. The court denied appellant's request to use it. The trial court excluded it.

No claim of privilege is applicable here. The Government waived its rights under the order of the Attorney General, No. 3229, when it chose to prosecute appellant in this case. The judicial responsibility imposed upon the trial court to determine whether a fair and just summary was required to be given to the appellant overcomes and outweighs the privilege of Order No. 3229 of the Attorney General.—See *United States v. Andolschek,* 2d Cir., 142 F. 2d 503; *United States v. Krulewitch,* 2d Cir., 145 F. 2d 87; *United States v. Beekman,* 155 F. 580; *United States v. Cotton*

Valley Operators Committee, W. D. La., 1949, 9 F. R. D. 719.

The Government must be treated like any other legal person before the court. It has no special privileges as the king did before the Stuart judges in England.—*Bank Line v. United States,* 2d Cir., 163 F. 2d 133.

The secret investigative reports were material. The trial court could not discard its judicial function in determining whether a full and adequate summary had been made of the secret investigative reports without receiving the secret report into evidence and comparing it with the summary made by the hearing officer. —*United States v. Nugent,* 346 U. S. 1; *United States v. Evans,* D. Conn. Aug. 20, 1953, 115 F. Supp. 340.

It is respectfully submitted, therefore, that the trial court committed error in excluding the FBI report from evidence and depriving appellant of the use of it upon the trial to ascertain whether the hearing officer made a full and fair summary of the secret FBI investigative report.

IV.

The law gives selective service registrants the right to have free advice from government agents termed Advisors to Registrants. Appellant's board violated the law and failed to post their names and address, as required, and, in fact, failed to have any Advisors to Registrants.

32 C. F. R. §1604.41.

Appellant claimed he disbelieved in a Supreme Being and didn't have religious beliefs. Two learned ministers believed that his bald expression of his beliefs did not correctly present his true religious views, and they were prepared to so testify at the trial, thus demonstrating that appellant had been prejudiced by the failure to have an Advisor.

Appellant was injured during his selective service processing for he obviously needed the assistance of an Advisor in explaining and "translating" his aversion to orthodox religious terms. With an Advisor he could have removed the clouding of his claim.

V.

Congress has required that a registrant, professing to be a conscientious objector to war show certain qualifications to be entitled to a conscientious objector classification: he must believe in a Supreme Being and his beliefs must be "religious" and not be a "merely personal moral code".

Appellant argues that the intent of Congress, on these two subjects, has been misconstrued by the Attorney General, with respect to this appellant.

Appellant's beliefs and conduct are within the boundaries of what are "religious" beliefs.

The expression "merely personal moral code" is a misnomer and has no practical application.

VI.

Proceeding on the basis that this court might determine that the intent of Congress has not been mis-

construed by the Attorney General, it is appellant's final position that the "Supreme Being" clause offends the Constitution.

A. The VIth Article (3rd clause) provides that no religious test shall ever be used as a qualification for any political office. The Supreme Being clause, nevertheless, makes it impossible for many truly religious citizens to qualify for a conscientious objector classification; inevitably, their religious scruples make felons out of them, as the law now stands, and they are thereafter disqualified for public office.

B. The 1st Amendment provides that Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof.

The Supreme Being clause is an establishment of the religious views of the majority:

(1) Congress has no right to legislate what is and what is not religious belief.

(2) Finally, a registrant may have religious beliefs, meeting all reasonable standards, even though he does not believe in a Supreme Being.

ARGUMENT

I

Upon the Second Appeal of the Case to the Appeal Board There Was No Hearing Conducted by the Department of Justice as Required by the Act and Regulations in Cases of Appeals by Registrants Professing Conscientious Objections to All Military Training and Services Both Combatant and Non-Combatant.

A. The Facts:

There is no dispute over the following facts concerning the second appeal:

1. On November 6, 1951 the Appeal Board sent the standard request to the United States Attorney that sets in motion the special appellate procedures for conscientious objectors, hereafter set forth and discussed; [Ex. p. 58]
2. On May 7, 1952, pursuant to aforesaid request, the hearing officer in Los Angeles directed appellant to appear before him; [R. 51-52. There is no page in the exhibit on this because the hearing officer procedure is not a part of the selective service system but is a service performed for it by the Department of Justice]
3. On May 19, 1952 appellant telephoned the Los Angeles Hearing Officer to have the matter transferred to a New York Hearing Officer; [Ex. 62]
4. On May 26, 1952 the United States Attorney at Los Angeles sent the file to the United States

Attorney in Brooklyn with the following request:

> "Will you kindly send this case to a hearing officer in your district as soon as convenient?" [R. 84]

5. On July 9, 1952 Hearing Officer Thomas O'R. Gallagher, directed appellant to appear before him on July 23, 1952, at 188 Montague St., Brooklyn, N. Y. [Notice not available during trial. The fact is conceded by appellee.] [R. 85]
6. On July 15, 1952 the Attorney General withdrew the case from the hearing officer, Hon. Thomas O'Rourke Gallagher. [R. 85]
7. On July 23, 1952 appellant appeared before Mr. Gallagher. The undisputed testimony concerning what transpired is as follows:

   "When I got up to see Mr. Gallagher, he came out and he asked me my name, and he said, 'You are not even supposed to be here.' And I said 'Why?' He said, 'Because you already had a hearing.' And so I went home." [R. 52.]

During the trial the Government argued that appellant's file disclosed he wasn't eligible for a hearing officer hearing because he wasn't a *religious* objector. This argument so impressed the court that it was used as the basis for decision. [R. 87-95.] This argument is speculative for it was contrary to the evidence that only one reason was given for the cancellation of the hearing. True, the Attorney General gave appellant's views as a reason the Appeal Board should deny the claimed classification but appellant's views were never

advanced as a reason for denying him the hearing. Therefore, at this juncture, we will deal only with the evidence, namely, does the fact a registrant "already had" a hearing preclude him from having another thereafter? [However, a discussion of the *eligibility* of appellant for a conscientious objector classification is to be found hereinafter in Points V and VI.]

B. The Law:

The Act and the Regulations show that it was the intent of Congress that the *bona fides* of professed conscientious objections be determined and that when the question reaches the administrative appellate level that the Department of Justice shall help the Selective Service System, in the following manner:

> "The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned and such person shall be notified of the time and place of such hearing." [§6(j) of U. S. C. 50 App.] For the verbatim regulations based on the Act, and in effect at the time, see Point IV hereinafter.

C. Argument:

It is clearly intended that the registrant be permitted to attend the hearing. *United States v. Nugent,* 73 S. Ct. 991.

(1) Concerning the appropriate inquiry:

Although the record is blank concerning the "approprate inquiry" [this is the FBI investigative

report] it is obvious that the period from November 6, 1951 to May 7, 1952 was so used: the court has observed dozens of such 6 months periods so used in conscientious objection cases and with the knowledge we have of the expeditious manner all other items of procedure were handled in this case [see Facts above] this court should take judicial notice that the usual FBI investigations were made.

(2) Concerning the hearing:

The only reason disclosed by the selective service file, or the evidence, concerning why appellant was not given the hearing in Brooklyn was "Because you already had a hearing". [R. 52.] The question arises: Since all the officials of both the Selective Service System and of the Department of Justice worked from September 1951 to July 1952 to process the second appellate determination why was the final step of the "special procedure for conscientious objectors" not considered necessary? Almost two years had elapsed since appellant's Los Angeles hearing officer hearing. Nearly everyone would concede that a young man's views on conscientious objection undergo some kind of change and/or maturation in such a period. Conceivably, appellant could have come to realize that his views *were* essentially religious and that the only thing that stood between him and a conscientious objector classification was semantics. Conceivably, he could even have undergone an orthodox conversion to orthodox religion. The FBI investigation would have revealed the facts to the Brooklyn hearing officer. If it didn't reveal them then appellant could have testified

on this subject to the said hearing officer; also if it did so reveal and if the Department of Justice had carelessly or maliciously suppressed the facts known to them then when appellant subpoenaed in the second set of investigative reports the court could have compared them with the official recommendations to the appeal board even if the court decided not to permit appellant to use them during the trial. See *United States v. Evans,* 115 F. Supp. 340.

It is clear from the Act, the Regulations and from *Nugent, supra,* that the hearing is mandatory and that the claimed classification is not to be denied the registrant on the basis of *part* of the evidence which has not been reexamined *at the hearing.* Since so much time had elapsed it should have been obvious to everyone that the Brooklyn hearing was essential. It was obvious to the Los Angeles hearing officer, on May 7, 1952, when he arranged for the May 19th hearing; obvious to him on May 19th when he asked the United States Attorney at Los Angeles to have it transferred to Brooklyn; obvious to the United States Attorney at Los Angeles when he did so arrange; obvious to the United States Attorney at Brooklyn when he arranged for one with the Brooklyn hearing officer, and obvious to the hearing officer when he set July 23, 1952 as the date for the hearing. The Attorney General alone didn't agree.

To the above list of persons who believed Davidson *was one* entitled to the administrative appellate determination (as are all professing conscientious objections) must be added *all the selective service officials.* Even the State Director thought so [Ex. p. 31.] This

is of major importance because Congress has intended that their judgment on factual matters is of prime consideration. They are the ones who are to pass on all factual matters. See *Estep v. United States,* 327 U. S. 114. At all stages the selective service agencies *approved* appellant's desire to exhaust his administrative procedure. The very first time the question arose it was squarely presented and squarely decided: the first document appellant gave the local board was SSS form 100, Classification Questionnaire. He signed the Series XIV conscientious objector declaration-request for SSS form 150, Special Form for Conscientious Objector and he attached a note (Exhibit p. 11) which stated, among other things: "If after considering these facts the board feels that they wish to send me the form for conscientious objectors, I will be glad to fill it and return to the board with the understanding that my objections are not religious but political." The local board obviously believed registrants are entitled to have their claims determined and sent him the form and neither then or thereafter did the local board (or the appeal board, or State Headquarters at any time) make any effort to deprive Davidson of his full appellate rights.

The attitude of General Lewis B. Hershey, the Director of Selective Service (and the one-time attitude of the Department of Justice itself) on this subject is evident from a report prepared by reason of the 1947 suggestion of President Truman:

> "The Department of Justice and Selective Service took the position that *each* time the case of a registrant who claimed to be a conscientious ob-

jector came before a board of appeal, the case must be referred to the Department of Justice for its recommendation. This was felt to be the direct application of the law. In addition such reference was necessary because *new factors* in the case might be brought to light by the Department's investigation *and hearing.*" (Emphasis added.)

See Selective Service System, *Conscientious Objection,* Special Monograph No. 11, Vol. 1, p. 150, Washington Government Printing Office, 1950. Also see pages 147 and 155.

It is believed that there is no case squarely in point, that is, involving repetitive hearing officer hearings. There are three unreported cases where trial courts acquitted because a hearing officer hearing was never given, and one reported case: *United States v. Frank,* 114 F. Supp. 949 (Judge Lemmon, N. D. Calif. June 16, 1953). There are many cases that hold that the denial of a hearing [local board hearings, in all these cases] provided by the regulations is a denial of due process.—*United States v. Peterson,* 53 F. Supp. 760 (N. D. Calif. S. D.); *United States v. Laier,* 52 F. Supp. 392 (N. D. Calif. S. D.); *United States v. Fry,* 203 F. 2d 638 (2nd Cir.); *Davis v. United States,* 199 F. 2d 689 (6th Cir.).

A closely related point [denial of hearing officer hearing] is presently before this court in the case of *Sterrett,* No. 13901 and *Triff,* No. 13952 argued February 16, 1954 and as yet undecided. The legislative history is set forth in the briefs in the *Sterrett* and *Triff* appeals.

It is submitted that it was illegal for the final decision to be made wihtout the Brooklyn hearing officer hearing.

II

Appellant was denied his rights to procedural due process of law when the appeal board considered and acted upon the adverse recommendation made by the Department of Justice against appellant without first giving him an opportunity to answer the recommendation.

The recommendations of the Department of Justice were against appellant. The appeal board was told that the conscientious objector claim should be denied. Appellant was not given an opportunity to answer the recommendations before the appeal board made the final classifications. Their classifications thereby denied the conscientious objector claim. The appeal board accepted and followed the recommendations by the Department of Justice.

Section 1626.25 of the Selective Service Regulations (32 C. F. R. § 1626.25) provided:

> "*Special Provisions When Appeal Involves Claim That Registrant Is a Conscientious Objector.* — (a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:
>
> "(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any

form and by virtue thereof to be conscientiously opposed to combatant training and service in the armed forces, but not conscientiously opposed to noncombatant training and service in the armed forces, the appeal board shall first determine whether or not such registrant is eligible for classification in a class lower than Class I-A-O. If the appeal board determines that such registrant is eligible for classification in a class lower than I-A-O, it shall classify the registrant in that class. If the appeal board determines that such registrant is not eligible for classification in a class lower than Class I-A-O, but is eligible for classification in Class I-A-O, it shall classify the registrant in that class.

"(2) If the appeal board determines that such registrant is not eligible for classification in either a class lower than Class I-A-O or in Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(3) If the registrant claims that he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, the appeal board shall first determine whether or not the registrant is eligible for classification in a class lower than Class I-O. If the appeal board finds that the registrant is not eligible for classification in a class lower than Class I-O, but does find that the registrant is eligible for classification in Class

I-O, it shall place him in that class.

"(4) If the appeal board determines that such registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(b) No registrant's file shall be forwarded to the United States Attorney by any appeal board and any file so forwarded shall be returned, unless in the "Minutes of Action by Local Board and Appeal Board" on the Classification Questionnaire (SSS Form No. 100) the record shows and the letter of transmittal states that the appeal board reviewed the file and determined that the registrant should not be classified in either Class I-A-O or Class I-O under the circumstances set forth in subparagraph (2) or (4) of paragraph (a) of this section.

"(c) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by

his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

"(d) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendations of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice."

Section 1626.26 of the Selective Service Regulations (32 C. F. R. § 1626.26) provides:

"*Decision of Appeal Board.*—(a) The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant, except that an appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed forces to be disqualified for any military service because of physical or mental disability.

"(b) Such classification of the registrant shall be final, except where an appeal to the President is taken; provided, that this shall not be construed

as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of part 1625 of this chapter."

The holding by the court below that there was no deprivation of due process of law is out of harmony with many decisions. The courts have uniformly held that where an administrative determination is made upon an adverse recommendation by a government agent it is necessary that the person concerned be advised of the governmental proposal and be heard upon it before the final determination. In *Brewer v. United States,* 4th Cir., April 5, 1954, 211 F. 2d 864, the court held that consideration by the appeal board of the secret FBI investigative report, inadvertently sent to the board by the Department of Justice, deprived him of due process of law. The court found that the registrant was denied the right to answer the FBI report before the appeal board. The court, however, said erroneously that a registrant was given the right by the regulations to see and answer the recommendation of the Department of Justice to the appeal board. Contrary to that statement are the regulations which do not grant the right. The holding by the court below on this point is also in direct conflict with *Degraw v. Toon,* 2d Cir., 151 F. 2d 778, and *United States v. Balogh,* 2d Cir., 1946, 157 F. 2d 939, vacated 329 U. S. 692, and later affirmed 2d Cir., 1947, 160 F. 2d 999.

The holding by the court below that action on secret reports of a trial examiner or agency hearing officer without an opportunity to reply before final decision is made by the administrative agency is not a violation of

due process of law conflicts directly with *Kwock Jan Fat v. White,* 253 U. S. 454, 459, 463, 464; *Morgan v. United States,* 304 U. S. 1, 22, 23; *Interstate Commerce Comm'n v. Louisville & Nashville R. R. Co.,* 227 U. S. 88, 91-92, 93; *United States v. Abilene & S. Ry. Co.,* 265 U. S. 274, 290; and *Oregon R. R. & Navigation Co. v. Fairchild,* 224 U. S. 510, 524.

In the case of *Morgan v. United States,* 304 U. S. 1, the Court said: "Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command. No such reasonable opportunity was accorded appellants." (304 U. S. at page 19) Identically the same secret proposal was made here by the Department of Justice, and the appeal board acted upon it in this case without the knowledge of the appellant in time to protect himself. The star-chamber procedure prescribed by the regulations is a denial of due process of law. It conflicts with the "fair and just" provisions of Section (1c) of the act, and the Fifth Amendment to the United States Constitution.

Section 1(c) of the Universal Military Training and Service Act (50 U. S. C. App. (Supp. V) § 451(c)) provides:

> "The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of

an effective national economy."—June 24, 1948, ch. 625, I § 162 Stat. 604 amended June 19, 1951, ch. 144 title I § 1(a) 65 Stat. 75.

It is respectfully submitted that the trial court should have granted the motion for judgment of acquittal.

III

The court below committed reversible error when it refused to receive into evidence the FBI report and excluded it from inspection and use by the court and the appellant upon the trial of this case.

Upon the trial appellant subpoenaed the secret investigative reports of the FBI. A motion to quash was made by the Government. The trial court refused to permit them to be used as evidence.

The secret reports of the FBI made in the investigation of the conscientious objector claim of appellant were subpoenaed. The trial court excluded the documents and forbade them to be received into evidence. It refused to allow them to go into evidence because it held the order of the Attorney General, No. 3229, made them confidential and forbade that they be received into evidence.

Under the decision of the Supreme Court of the United States in *United States v. Nugent,* 346 U. S. 1, it was held that the statute required the Department of Justice to make a fair, complete resume or summary of all the FBI investigative report and give it to appellant. A resume or summary was given to appellant on the first hearing. A resume or summary

was made by the Los Angeles hearing officer to the Department of Justice.

The only way that the Court can determine whether the summary that was given is adequate is to admit in evidence the FBI report. The only way the trial court could have discharged its responsibility in this case was to have the reports produced. The trial court must say whether the summary of the secret FBI report made by the Department of Justice under Section 6(j) of the act is fair and adequate.

It is necessary, therefore, that the FBI report be produced to the Court. Unless and until this Court sees and examines the FBI report and also unless and until appellant sees and examines the FBI report and compares it with the summary that should have been made or compares it with the summary made by the Department of Justice to the appeal board, there is no due process.

The Court cannot discharge its judicial function and determine whether the summary required by the Supreme Court of the United States in *United States v. Nugent,* 346 U. S. 1, is fair and adequate unless and until the Court has actually seen and examined the secret FBI report. In fact appellant's rights are not preserved unless and until he has had an opportunity to examine the secret FBI report and compare it with the summary required to be made.

The decision of the Supreme Court in *United States v. Nugent,* 346 U. S. 1, dealt only with the contention that the secret FBI report should be produced to the registrant at the hearing in the administrative agency.

The trial court, as a result of *United States v. Nugent,* 346 U. S. 1, must determine another and different question. It is whether the *Nugent* opinion required the trial court to determine whether a summary of the adverse evidence was needed to be given and, if given, was it adequate? The holding in the *Nugent* case required the court to do that in this case. The court cannot discharge the judicial function placed upon it in the *Nugent* case without seeing the FBI report. The report cannot be seen without admitting it into evidence.

Even through the records sought by the appellant are claimed to be confidential by the Attorney General's Order No. 3229 issued pursuant to 5 U. S. C. Section 22, they must be produced because such documents are a part of and form the basis of the administrative determination and action supporting the indictment questioned by the registrant.—See *United States v. Stasevic,* S. D. N. Y., Dec. 16, 1953, 117 F. Supp. 371; *United States v. Edmiston,* D. Nebr., Omaha D., No. Criminal 82-52, Jan. 28, 1954; *United States v. Stull,* E. D. Va., Richmond D., Criminal No. 5634, Nov. 6, 1953; *contra United States v. Simmons,* 7th Cir., June 15, 1953,—F. 2d —.

The only time the privilege of the Department of Justice pursuant to Attorney General's Order No. 3229 (5 U. S. C. § 22) has been permitted to override the claim of procedural due process has been in cases where there is a plain showing that the disclosure would endanger the national security.

On the trial of this case the question arose as to whether the verbal communication by the hearing officer to the appellant upon the occasion of his Los Angeles hearing constituted "a fair resume" of the evidence that was adverse appearing in the FBI reports.

The Court cannot determine whether the resume given at the hearing is fair without inspecting the secret investigative report. That report cannot be inspected unless it is subpoenaed and produced at the trial.

It is submitted that the FBI report was not privileged and that the constitutional rights of the registrant were violated when it was not produced and not allowed to be used in evidence at the trial by the appellant.

IV

The failure to have the names and addresses of advisors to registrants posted in the local board office, resulted in a denial of due process to Appellant.

Section 1604.41 of the selective service regulations, at all times has been:

> ADVISORS TO REGISTRANTS
>
> 1604.41 APPOINTMENT and DUTIES.—
>
> Advisors to registrants shall be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the Selective Service law.

> Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office.

Lt. Col. Francis A. Hartwell testified that he is the assistant deputy Director of Selective Service for the State of California and that there are no Advisors to Registrants "set-up" in California. [42]. In the case of *Mason v. United States,* No. 14286, currently before this court the record discloses that Lt. Col. George R. Farrell testified that he is Co-Ordinator of District Three, Selective Service System, State of California [51] and none of the boards in his district have ever complied with Section 1604.41 of the regulations [53].

It is therefore clear that no California local boards have such advisors and no names and addresses are posted. This fact, alone, but especially when coupled with the facts of this case showing that this appellant needed an advisor, amounts to a denial of due process.

Such was the holding of Judge Pierson Hall in *United States v. Kariakin,* No. 23223, S. D. California, January 12, 1954:

> "MR. TIETZ: Your Honor has heard me on all the material points that I wish to present.
>
> THE COURT: Very well.
>
> I am inclined to think that your point is good in connection with the matter of not being properly advised of his rights. You call it a matter of defective notice.
>
> MR. TIETZ: Yes, sir.
>
> THE COURT: I do not know that it could be so classified as a defective notice because I do not

know that they are required by any regulation to give a notice which includes that.

MR. TIETZ: But they do. That is what I was trying to establish.

THE COURT: They do that as a matter of practice and it is not—in other words, I do not think the practice can result in the creation of a right to a person to commit a crime, but I do think that under the regulations and the Selective Service procedure that these men are entitled to have advisors and persons performing the function of advisors and they are entitled to be able to look to them for advice and to be told by them what their rights were. In this case he was entitled as a matter of right to receive the fair summary of the adverse testimony if he requested it, but he was never advised that he had the right to request it, either by the notice and the fact that they do now contain that notice, which I understand you stipulated to is evidence that the Selective Service System recognizes that they are entitled to have that advice and were entitled to have that advice.

For that reason I think that the defendant here was deprived of his right to that advice and that the regulations were not followed in that respect and he should be and is acquitted, and his bond is exonerated.

MR. TIETZ: Thank you."

The undisputed testimony was that appellant never received any advice from any Selective Service officials and never knew he could obtain various items of information and/or help from them. [R. 63, 58, 51.]

Since the local board violated § 1604.41 and to appellant's prejudice he was denied due process of law and should have been acquitted.

V

The "Supreme Being" and "Merely Personal Moral Code" clauses in the Selective Service Act of 1948, as amended, as applied to Appellant, were misconstrued by the Department of Justice and the Trial Court and Appellant should have been allowed to show, and The Court should have considered, that the correct construction of Appellant's Selective Service file brought him within the intent of Congress concerning a registrant's religious belief and a registrant's belief in a Supreme Being.

There is no dispute that appellant claimed (1) to be a conscientious objector and (2) entitled to a classification as such.

Also, there is no dispute that appellant's draft board didn't have posted the names and addresses of the Advisors to Registrants required by § 1604.41 of the Regulation. This point has already been argued but is important here to show that appellant was deprived of assistance in filing his selective service forms, and thereafter; put another way, he didn't have the help the regulation intended registrants were to have, help that in this instance could have "translated" his rebellious expressions to ones more orthodox, more truly expressive of the facts and more understandable.

During the trial appellant sought to use certain "translators," (two experienced ministers), who were prepared to testify that the expressions appellant used

in his file, concerning his beliefs, were actually ambiguous, and therefore needed interpretation as to whether they were descriptions of religious beliefs.

Appellant believes that it is very wrong to ask 19 year olds to define God and religious belief and then to take them strictly at their word. It is widely held that an individual's testimony concerning himself and particularly concerning his own mental attitude is not too trustworthy. Some extreme illustrations may be considered to highlight this point: over two dozen persons have confessed the Los Angeles Black Dahlia murder; the counselor or psychoanalyst listens to all that is said and then often forms an opinion quite contrary to the self-diagnosis uttered.

The two experienced ministers (and the selective service advisor, had there been one, and the Appeal Agent, had he been diligent, as required by law) were more competent to investigate and then explain ("translate") the true meaning of appellant's answers to the selective service questions on God and religion than the registrant himself. The ministers were in court, ready to testify that appellant, while abysmally ignorant of the meaning of religion, was truly religious.

The pertinent portion of section 6(j) of the Act will now be set forth (in caps and quotes) and the argument will be made substantially *phrase by phrase:*

> "NOTHING CONTAINED IN THIS TITLE SHALL BE CONSTRUED TO REQUIRE ANY PERSON TO BE SUBJECT TO COMBATANT TRAINING AND SERVICE IN THE ARMED FORCES OF THE UNITED STATES WHO

BY REASON OF RELIGIOUS TRAINING AND BELIEF. . . ."

There is confusion in the file over the question whether Davidson's objection was *by reason of* religious training and belief. On the surface it appears that Davidson and the Department of Justice are in agreement that his objection is not religious. However, it should be obvious that Davidson and the Department officials were in effect talking different languages without an interpreter. As he used the term "religious" in Form 150 he made it plain that he did not take his stand for unreasonable or superstitious religious reasons, but rather for the value of brotherhood as he had come to understand brotherhood with the help of Christ and Christians like Tolstoy and William James and the Christ-like non-christian Gandhi. He thought that to be religious within the Selective Service frame of reference meant to accept the formula "*a* Supreme Being", and that he refused to do.

Appellant, during the trial, attempted to explain the true meaning of his answers by the use of religious experts. He qualified them, and, when the court rejected their testimony he made the following proffers for both [R. 35—for Kinney, 39 for Hunter].

> "If this witness were permitted to testify, he would inform the court that based on his study of the file in question, he says that this defendant's beliefs are religious; that they are not views that are denominated political, although the defendant has so termed them. That the defendant has religious training, as shown by the file, based on about ten years of Sunday School, based on com-

ing from a home that has had occasional contact with organized religious other than the Sunday School period. That this witness' work as the national secretary of the Socialist Youth Organization is not only to him, but in the eyes of theologians, a religious activity; particularly, as set forth in James, [James 2:14-26] in that it is social action. The equivalent of the social action work of various large denominations is well known to you, particularly the Methodists, the Friends, and others.

"That this defendant has an aversion to the use of orthodox terms. That this aversion is due to an annoyance with the prevailing attitude that can perhaps be best expressed by an incident in Gandhi's life, when he was approached by some friends, and one said, "You are a good Christian." And he said, 'I consider that an insult. But if you were to say I am Christ-like, I would consider that the highest compliment you could pay me."

"So if this defendant, in his reaction to the prevailing attitude finds, as he sees it, where people claim to have a religion but do not practice it, has devoted his life to certain religious ideals recognized by theologians, to promote a better society and equality of man, that he does have not only a religious training, which is set forth in his file, but has a religious belief.

"This witness would give the opinion that he also—although the defendant denies it—he also believes in a Supreme Being. He goes beyond that. The witness; however, would enlighten the court on the point of Supreme Being in this way—unless I am sadly misquoting the witness, and I don't think I am; he considers that the term "a Supreme

> Being" is a misnomer; could be considered blasphemous in itself; that the defendant has gone even beyond that point, and he believes in a creative force. He does not choose to call it "a Supreme Being," with the emphasis on the article "a".
>
> Then the witness would go on to testify on another point, if permitted, and that point is, as was stated as being the last point I would like to argue: With the second innovation in the 1948 law, and readopted in the 1951 law, proscribing a merely personal moral code, that there is no such thing as a merely personal moral code, and he would elucidate on that by pointing out that we are creatures of our environment, and our environment is one that frowns on killing, and is a contradiction in terms, and Congress was in error.
>
> That, your Honor, is the substance as I, as a layman, would state the testimony of this witness, and of the subsequent witness, whom I would like to at least qualify, so that we can have the record for that witness, too."

So much that passes for religion is superstitious and unreasonable and opposed to social progress, so many who call themselves Christians, make Negroes and others unwelcome in their churches and confuse their Christianity with other things such as military nationalism, that Vern Davidson refused military service, he said, *by reason* of the fact that he was a Socialist. That is true, but it is also true, and more basically true, that he is a Socialist by reason of the fact that he has belief in the way of life that Christ was describing—a way of life that stresses brotherhood. Davidson found

that the Socialist groups of his acquaintance practiced brotherhood more consistently than the average group labeled as "religious" did, and by reason of his religious training and belief, he chose to stress the practice and to deny the label. So, an official of the Department of Justice system has illegally construed the law as excluding Davidson from part of his appellate procedure.

"IS CONSCIENTIOUSLY OPPOSED TO WAR IN ANY FORM.

This is granted. See hearing officer's report [Ex. p. 38—].

"RELIGIOUS TRAINING AND BELIEF IN THIS CONNECTION MEANS AN INDIVIDUAL'S BELIEF IN A RELATION TO A SUPREME BEING."

The law here does not say that the individual must accept the formula, "a Supreme Being." Vern Davidson rejects that formula. And as the law has been misconstrued, that refusal excluded him from the hearing he sought.

Since his draft board was illegally functioning without an Advisor (§ 1604.41) and the Government Appeal Agent did not diligently investigate the case as required by the regulations (§ 1604.71), the fact that Davidson affirms belief in a creative power greater than man was not brought out in the selective service file, and the Attorney General apparently assumed that Congress had the power to require literal acceptance of a formula, "a Supreme Being." The problem concerning acceptance of such a formula is

treated in *Systematic Theology,* Vol. I, by the Reverend Doctor Paul Tillich, professor of philosophical theology at Union Theological Seminary in New York. The book was published in 1951 by the University of Chicago Press.

"It is a remarkable fact that for many centuries leading theologians and philosophers were almost equally divided between those who attacked and those who defended the arguments for the existence of God. Neither group prevailed over the other in a final way. This situation admits only one explanation: the one group did not attack what the other group defended. They were not divided by a conflict over the same matter. They fought over different matters which they expressed in the same terms. Those who attacked the arguments for the existence of God criticized their argumentative form; those who defended them accepted their implicit meaning.

" . . . However it is defined, the 'existence of God' contradicts the idea of a creative ground of essence and existence . . . Actually they" (the scholastics) "did not mean 'existence' [when they spoke of "the existence of God"]. They meant the reality, the validity, the truth of the idea of God, an idea which did not carry the connotation of some*thing* or some*one* who might or might not exist. Yet this is the way in which the idea of God is understood today in scholarly as well as in popular discussions about the 'existence of God.' It would be a great victory for Christian apologetics if the words 'God' and 'existence' were very definitely separated except in the paradox of God becoming manifest under the conditions of evistence, that

is, in the christological paradox. *God does not exist. He is being-itself beyond essence and existence. Therefore, to argue that God exists is to deny him.*" (pp. 204-205).

> "Thus the question of the existence of God can be neither asked nor answered. If asked, it is a question about that which by its very nature is above existence, and therefore the answer—whether negative or affirmative—implicitly denies the nature of God. It is as atheistic to affirm the existence of God as it is to deny it. God is being-itself, not a being." (p. 237).

At this time appellant desires to point out that it is only the Department of Justice that requires belief in the "existence" of God; Congress does not.

On page 64 of the selective service file (the Exhibit) it is to be seen that the Attorney General wrote the Appeal Board "The registrant states that he does not believe in the existence of a Supreme Being. . . ." The Act does not so express it. [§6(j)]. The registrant and the Attorney General are both in error for there must be a prior ground to all existence.

> "If taken in the broadest sense of the word, theology, the *legos* or the reasoning about *theos* (God and divine things), is as old as religion. Thinking pervades all the spiritual activities of man. Man would not be spiritual without words, thoughts, concepts. This is especially true in religion, the all-embracing function of man's spiritual life."[4]

"[4]The term "spiritual" (with a lower-case s) must be sharply distinguished from "Spiritual" (with a capital S). The latter refers to activities of the divine Spirit in man the former, to the dynamic-creative nature of man's personal and communal life." (p. 15).

"The Christian claim that the *logos* who has become concrete in Jesus as the Christ is at the same time the universal *logos* includes the claim that wherever the *logos* is at work it agrees with the Christian message. No philosophy which is obedient to the universal *logos* can contradict the concrete *logos,* the Logos "who became flesh." (p. 28)—(See John 1:14).

"God is the principle of participation as well as the principle of individualization. The divine life participates in every life as its ground and aim. God participates in everything that is: he has community with it; he shares in its destiny. Certainly such statements are highly symbolic. They can have the unfortunate logical implication that there is something alongside God in which he participates from the outside. But the divine participation creates that in which it participates." (p. 245).

"The being of God is being-itself. The being of God cannot be understood as the existence of a being alongside others or above others. If God is *a* being, he is subject to the categories of finitude, especially to space and substance. Even if he is called the 'highest being' in the sense of the 'most perfect' and the 'most powerful' being, this situation is not changed. When applied to God, superlatives become diminutives. They place him on the level of other beings while elevating him above all of them. Many theologians who have used the term 'highest being' have known better. Actually they have described the highest as the absolute, as that which is on a level qualitively different from the level of any being—even the highest being." (p. 235).

"The concrete side of final revelation appears in the picture of Jesus as the Christ. The paradoxical Christian claim is that this picture has unconditional and universal validity, that it is not subject to the attacks of positivistic or cynical relativism, that it is not absolutistic, whether in the traditional or the revolutionary sense, and that it cannot be achieved either by the critical or by the pragmatic compromise . . . it belongs to the tragic character of all life that the church, although it is based on the concrete absolute, continuously tends to distort its paradoxical meaning and to transform the paradox into absolutisms of a cognitive and moral character. This necessarily provokes relativistic reactions." (p. 151).

"INVOLVING DUTIES SUPERIOR TO THOSE ARISING FROM ANY HUMAN RELATION".

It would be legitimate to assume that Congress means that the registrant must recognize a transcendent dimension beyond merely horizontal human relationships, and to require that the registrant go beyond belief into faithful action. But any interpretation of the words, to be legal and proper, must avoid the implication that human relations *are* merely horizontal. The twenty-fifth chapter of Matthew deals with this point. "Lord, when did we see thee hungry and feed thee, or thirsty and give thee drink? . . . Truly, I say to you, as you did it to one of the least of these my brethren, you did it to me." Mt. 25:37-40. Jesus equates love of God with love of neighbor (Mt. 22:39). The two are inseparable. John puts it point-

edly: "No man has ever seen God; if we love one another, God abides in us and his love is perfected in us. . . . If anyone says, "I love God," and hates his brother, he is a liar; for he who does not love his brother whom he has seen, cannot love God whom he has not seen." (I John 4: 12 and 20.)

There are some conscientious objectors whose religious belief is of an authoritarian and other-worldly sort. They could be easily recognized as coming under the phrase of the law which says, "involving duties superior to those arising from any human relationship." But it is illegitimate for Congress to intend or for Selective Service and/or the Department of Justice to practice an application of this to exclude those who refuse to assert or practice that which is contrary to their deepest convictions. It is improper to construe the phrase in such a way as to exclude those who emphasize human relationships. Such construction would exclude Jesus, John, James and Paul. For them God is not *a* being alongside or above other beings, but is the divine life participating in every life as its ground and aim. (See above quotations from Tillich.)

"BUT DOES NOT INCLUDE *ESSENTIALLY* POLITICAL, SOCIOLOGICAL, OR PHILOSOPHICAL *VIEWS*".

Congress may mean by that, in connection with conscientious objectors, that religious training and belief must have a vitality that goes beyond the mere intellectual activity of having views. This would be a legitimate requirement; mere intellectualism is not enough to qualify an objector. But if Congress meant

or Selective Service or the Department of Justice interprets it to mean that the intellectual must be ruled out, either Congress or Selective Service or both have exceeded their proper powers. And where Selective Service and/or the Department of Justice regards socially relevant *action* as a contraindication of religious belief, it is in error. Vital religious belief inevitably has political and sociological consequences. (See 1622.1 (d) of the Regulations forbidding discrimination on religious grounds).

"OR A MERELY PERSONAL MORAL CODE"

Congress can legitimately demand that the eligible objectors have something more than an intellectually held code. There must be action, living expression. But how can there be a moral code that is merely personal in the sense of merely individual? A moral code involves standards of *relationships,* and it evolves in a culture. Appellant's moral code is formulated in the light of Christ's teachings and is not merely intellectually held but put into action in the social scene.

> . . . . "ANY PERSON CLAIMING EXEMPTION FROM COMBAT AND TRAINING AND SERVICE BECAUSE OF SUCH CONSCIENTIOUS OBJECTIONS SHALL, IF SUCH CLAIM IS NOT SUSTAINED BY THE LOCAL BOARD, BE ENTITLED TO AN APPEAL TO THE APPROPRIATE APPEAL BOARD."

Davidson has claimed exemption *because of* such conscientious objections. His claim is clouded by his

saying, "But my beliefs are not religious, they are basicly political." The context of the whole file, however, illustrates that he means by this, 'But my beliefs are not religious [in the sense of an unreasonable and superstitious religious belief], they are basically political [in the sense of applying the teachings of Christ to the existential situation in practical loving action]. The Department of Justice, in a letter written July 29, 1952, states: "It is clear from all the evidence that the registrant bases his alleged objections, not upon religious training and belief, but upon political, sociological, or philosophical views. . ." [Ex. p. 64-65]. That is in error. *Some* of the evidence taken out of context made it *look* clear, but the evidence needed more careful examination.

The use of theological experts for selective service problems is not an innovation. When their use is confined to ecclesiastical questions the procedure has met with judicial approval. See *United States v. Cain,* 149 F2 338, 341, and *Eagles v. Horowitz,* 67 S. Ct. 320.

The misconstruction of the laws and failure to use interpretive assistance deprived appellant of the correct construction of his expressed views. A correct construction of appellant's views, and of the law, shows he met the standards intended to be set up for recognition of conscientious objections to war.

Appellant was denied due process and should have been found not guilty by the trial court.

VI

The "Supreme Being" clause in the current draft law offends the Constitution.

The 1948 draft law (and the current 1951 amendment) contain an innovation. The so-called "Supreme Being" clause is not found in the 1940 or 1917 draft laws.

THE STATUE INVOLVED

Section 6 (j) of the Selective Service Act of 1948, as amended, (62 Stat. 604, 50 U. S. C. App. 98) also known now as the Universal Military Training and Service Act, as amended in 1951, 65 Sta. 75, 50 U.S.C.A. Appendix).

> "Nothing contained in this title [this appendix] shall be construed to require any person to be subject to combatant training and service in the Armed Forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical view or a merely personal moral code."

This definition of religious training and belief is an innovation and is not found in the 1940 draft law.

A. The Supreme Being Clause of the Draft Law offends the VIth Article (3rd Clause) of the Constitution.

> " . . . ; but no religious test shall ever be required as a qualification to any office or public trust under the United States."
>
> Art. VI § 3, U. S. Constitution.

It is a matter of common knowledge to all who have dealt with conscientious objectors that they prefer prison to surrendering their scruples, thereby becoming felons and ineligible for public office.

Estep supra.

In California and in most, if not all the states a man convicted of a felony cannot hold public office.

California Penal Code § 2600.

A test, based on religion, that a portion of the population cannot meet, is a test proscribed by the VIth amendment. Here the test in effect condemns such a person to a felon's disabilities.

The Supreme Being clause accomplishes indirectly what is prohibited to be done directly.

It's eventual effect is to effectively prevent all males who do not believe in a Supreme Being from qualifying for public office.

Communications Ass'n v. Douds, 339 U. S. 382, 415, the opinion reads:

"Clearly the Constitution permits the requirement of oaths by office holders to uphold the Constitution itself. *The obvious implication is that those unwilling to take* such an oath are to be barred from public office."

U. S. v. American Brewing Co., 296 F. 772, 776, the opinion reads:

> "Surely no one would so construe article 6 that the prohibition of a religious test applied only to officers named by the President, or the head of a department. . . ."

In *Christian Fligenspan v. Bodine, U. S. Attorney*, 264 F. 186, 195:

> "By Article VI, cl. 3, the members of the several state legislatures are to be bound by oath or affirmation to support the U. S. Constitution. This also unerringly points to a body separate and distinct from the people at large, for the latter are not required so to swear or affirm, and, in fact, none save naturalized citizens do so."

While the current "loyalty oaths" make some parts of this decision obsolete the principle remains true.

B. The Supreme Being Clause offends the 1st Amendment.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Amendment I.

The draft law establishes the religious view of the majority as the final criterion in the consideration of a Selective Service registrant as a sincere religious person.

(1)

It is unconstitutional in violation of the freedom guarantees of the First Amendment, because Congress has no right to legislate as to what is and what is not "religion".

Appellant hastens to point out that in this argument we are not discussing the point as to whether, in the draft law, Congress was *required* to exempt conscientious objectors from the operation of the law. We are discussing the fact that Congress *did* exempt conscientious objectors, who, by reason of religious training and belief, are conscientiously opposed to war in any form and then went on, contrary to the prohibition of the First Amendment, to exclude from the meaning of "religion" a particular type of belief, namely, a religious belief based on political, sociological, philosophical, or moral tenets as distinguished from a belief in a Supreme Being. By so circumscribing what religion shall mean Congress did the very thing which the prohibition of the First Amendment sought to prevent. Had Congress merely stated that conscientious objectors, who by reason of religious training and belief were conscientiously opposed to war in any form, were to be exempt, a totally different problem would be involved. But Congress did not do this; it set forth its *own* meaning as to what religion is. This it had no power to do.

This principle of constitutional law is clearly set forth by the Supreme Court in *United States v. Ballard,* 322 U. S. 78, 86:

"The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. . . . Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. *Board of Education v. Barnett,* 319 U. S. 624. It embraces the right to maintain theories of life and death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. . . . The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence and disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the *right to worship as he pleased* and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the trials of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for pre-

ferred treatment. It puts them all in that position." (Italics added.)

It seems clear that the authors of the Constitution precisely intended to guard against the very limitation imposed by Congress in the law.

Thus, Thompson, Secretary of the Constitutional Convention in publishing the proceedings says:

". . . the question was gravely debated whether God should be in the Constitution or not, and after a solemn debate he was deliberately voted out of it. . . ."

Clearly the Congress did the very thing that was forbidden to it. Indeed, Congress seems to recognize that political, sociological, or philosophical views or a personal moral code may be a religion but it specifically prohibited that kind of religion from protection. This it cannot do.

As was said in *West Virginia Board of Education v. Barnette,* 319 U. S. 624, 642:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . ."

Congress, therefore, by attempting to set up an orthodoxy in religion has exceeded the salutary restraining bounds of the First Amendment.

(2)

One may have religious belief even though he does not believe in a Supreme Being.

The Congress legislated that before one can be said to have a religious belief, he must believe in a Supreme

Being. The history of the world and the writings of scholars in the field quickly demonstrate the fallacy of such a position.

Thus the eminent scholar, Max Muller, has said:

> ". . . if an historical study of religion had taught us . . . one lesson only, that those who do not believe in our God are not therefore to be called Atheists, it would have done some real good, and extinguished the fires of many *suto da fè.*"
>
> (Natural Religion, p. 228.)

Two of the admittedly great religions of the world claiming many millions of followers deny the existence of God as we know it. Thus in Hastings, *Encyclopaedia of Religion and Ethics* 183, Buddhism is said to be "radically adverse to the idea of a Supreme Being—of a God, in the Western sense of the word." And the same work at page 185, quotes extensively from Hindu literature to demonstrate that the Sankhya School of that religion positively denies this existence of God.

No one claims, of course, that because of their denial of God, the Sankhya or the Buddhist belief is not "religion"; nor may Congress do so.

History is replete with the stories of non-conformists who were called atheists because they did not believe according to the current mode. Outstanding, of course, are the early Christians who, pious and moral though they were, were called atheists because they did not believe as did the Greeks or Jews. Parenthetically we may note that they too were often punished by the Romans for refusing military service.

> "Comte's religious conception appears to be atheistic, insofar as it rejects the view that nature and humanity are the products of a self-existent and self-conscious Eternal Cause."
>
> (2 Hastings, Encyclopaedia, 179).

Auguste Comte, it will be recalled, is considered to be the founder of modern sociology. Yet Hastings naturally assumes Comte's view to be a "religious conception". Speaking of Comte's followers, the Positivists, Dr. Stanley Coit, founder of the English "Ethical Culture" societies thus treats of their ideal of God:

> "So far as I am aware, the Positivists have never declared that Humanity is God. But they have maintained that all the homage and obedience which had been rendered to God should now be transferred to Humanity. They have worshipped Humanity, they have prayed to it, they have found strength and consolation in communion with it. Surely, then, it has become their God." *(International Journal of Ethics,* July, 1900, p. 425).

The lack of a positive assertion as to the existence of God is prominent in the religious teachings of the Unitarians and Universalists today. And prominent members of our society from whom we have derived considerable of our heritage have been among those of similar inclination.

Thus, Jefferson, in writing to his nephew at school, said:

> "Fix reason firmly in her seat, and call to her tribunal every fact, every opinion. Question with boldness even the existence of a God; because, if there be one, he must more approve the homage of

reason than of blindfolded fear. . . . Do not be frightened from this inquiry from any fear of its consequences. If it end in a belief that there is no God, you will find incitements to virtue in the comfort and pleasantness you feel in its exercise and in the love of others which it will procure for you."
(J. E. Remsbury, *Six Historic Americans,* (p. 66.)

And on another occasion he said:
"Why have Christians been distinguished above all people who have ever lived, for persecutions? Is it because it is the genius of their religion? No, its genius is the reverse. It is refusing toleration to those of a different opinion . . ." (A. J. Nock, Jefferson, p. 304).

Congress has placed the stamp of orthodoxy in a field where none exists. The Constitution embodied a toleration for *all* religion and not for some. Many scholars have defined religion in terms other than a belief in the existence of god, for example:

1. Hoffding: Religion is belief in the conservation of value.
2. Marshall: The restraint of individualistic impulses to universal human impulses.
3. Kropotkin: A passionate desire for working out a better form of society.
4. E. S. Ames: The consciousness of higher social values.
5. Elwood: Participation in ideal values of the social life.
6. E. A. Ross: The conviction of an idea bond between the members of society.

7. Mathew Arnold: Religion is morality touched with emotion.
8. G. B. Foster: The conviction that the cosmos is idea-achieving.
G. G. W. Knox: Man's highest response to what he considers highest.
10. G. A. Coe: Living the good life.
11. J. R. Seely: Any habitual and permanent admiration.
12. Bonsanquet: Loyalty and devotion toward values which are beyond the immediate self.

Indeed, many of the founding fathers would have failed to qualify as "religious" if the present act were applied in relation to them.

The Albany *Daily Advertiser* in 1831, published a sermon by Reverend Dr. Wilson in which the assertion was made that most of the founders of our country were "infidels" and that of the *first seven presidents not one of them had professed his belief in Christianity.* (Barnes, History and Social Intelligence, p. 347).

Dr. Barnes remarked:

> "The late Mr. (Theodore) Roosevelt, in one of his more facetious and gracious moments, referred to Thomas Paine, who had rendered most notable services in promoting the independence and formation of our country, as a 'dirty little atheist.' By the same criteria most of the Fathers, certainly Franklin, Washington, Adams, Jefferson, Madison, Marshall, Morris and Monroe, were likewise 'dirty little atheists' as they all shared the religious belief of Paine and most other intellectuals of the time, namely, either Unitarianism or Deism." (Ibid).

Having a lively appreciation of the evils of bigotry in religion, the authors of the Constitution took care to prevent any popular effort to secure religious conformity by law. In 1796 an attempt to insert a "Christian" Amendment in the Constitution was defeated. A speaker for the amendment referred to Washington's "Atheistic proclivities," censuring his admiration for the works of Thomas Paine. Washington, as we know, during his second administration, assured the Moslems of Tripoli, through his diplomatic representative, that "The government of the United States is not in any sense founded on the Christian religion" —a view later approved by John Adams, who sent the treaty containing this statement to the Senate, and by Jefferson, under whose administration the treaty containing the very quoted words, was ratified. *(Messages and Papers of the Presidents,* pp. 200, 245, 390.)

During the compaign for the presidency in 1800, Jefferson was widely attacked as a free-thinker. He was accused of disbelief in the conventional religion of his time, and so fearful were the orthodox of his infidel opinions that two pious ladies of New England, when they heard he was elected, buried their Bibles in the garden lest the terrible Jefferson send officers to conficate the holy Scriptures.

It can hardly be urged that any "popular" meaning of religion was intended by the authors of the Constitution to be used in determining whether a man is religious or not. Rather, if there be a criterion at all of the quality of being "religious", it must be sought in some other quarter than prevailing customs and inherited belief.

It has been shown, that from the earliest days of the Republic, numerous individuals, many of them illustrious figures in American history, obtained their moral and religious ideas from private study and reflection, and the quality of their religion became manifest in their lives. Countless men of today similarly derive their religious inspiration from unorthodox faiths; indeed, it is often claimed as one of the glories of American achievement that in the United States such men are free to practice their own individual religion. Shall we now circumscribe this freedom with limiting definitions founded on the dogmas of prevailing orthodoxy? Shall we jettison the right of an individual citizen to define his own religion and to practice it, when it is not the character of the practice which is in dispute—the law provides for religiously inspired conscientious objection—but simply the doctrinal authenticity of his profession of religion?

It is not here maintained that the question of whether a man is religious or not can be simply determined. Fortunately, this problem is seldom presented to the Courts. But when such questions do arise, it is absolutely necessary, we submit, that the greatest of care be taken to protect that most crucial of the Four Freedoms—freedom of religion. A man's religion is his life. It is valued above life by the truly religious man. And the quality of a man's religion is best determined by reference to the quality of his actions and the consistency of his resolves.

Accordingly, the Act by defining out certain admittedly good, moral and ethical beliefs as not "religious" though, it has been shown, they have every